STATE OF MICHIGAN

COURT OF APPEALS

WALLACE G. PEARSON,

Plaintiff-Appellant,

v

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

No. 204889
Marquette Circuit Court
LC No. 96-032667 CK

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

MARKMAN, P.J. (concurring).

I concur with the majority in regard to its determination that an "accidental bodily injury" can result from a voluntary act, as well as with its conclusion that the trial court in this case did not apply the correct standard in determining the policy coverage for a disability resulting from injuries by requiring the disability to result "solely" from injuries. Therefore, I join in the reversal of the trial court's grant of summary disposition and the remand for application of the correct law and standard. However, I respectfully disagree with the standard set forth by the majority, which is a proximate cause, negligence standard unrelated, in my judgment, to the language in the policy at issue, and which would apparently result in the injury provision of the policy subordinating the sickness provision wherever injury was a "substantial factor" in causing the disability, regardless of whether sickness was also a "substantial factor," and without attempting to reconcile the two provisions. Thus, I write separately in order to express my reservations regarding this standard and set forth what I believe is the more appropriate standard under the policy at issue.

I agree with the majority that the main goal in interpreting a contract, including an insurance contract, is to achieve a reasonable construction according to the intent of the parties. See *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). We must look for the intent of the parties in the words used in the instrument, and such words are to be given their ordinary and plain meanings, without technical constructions, unless so defined in the policy. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The specific wording of a contract must not be read in isolation, but, as the majority states, must take place

within the context of the contract as a whole, and conflicts between provisions should be reasonably harmonized. *Fresard v Michigan Millers Mutual Ins Co,* 414 Mich 686, 694; 327 NW2d 286 (1982). As this Court has reiterated many times before, a court does not have the right to make a different contract for the parties. See *UAW-GM, supra*. Thus, a court cannot look beyond the language set out in a contract by the parties to apply an unrelated legal standard or interpretation from another section of the law, unless required by statute or common law.

This Court must interpret the policy as a whole on the basis of logical analysis of the contract language and structure, as manifestations of the parties' intentions. Again, I agree with the majority that the two mutually exclusive clauses, of apparently equal significance, suggest a continuum of coverage between sickness and injury, "in which benefits are paid for an injury disability from the point where an insured suffers solely from an injury until the point where the marginal effect of the injury is outweighed by the marginal effect of sickness, and vice versa as to sickness benefits." However, unlike the majority, I believe that the logical point at which injury benefits would be transformed into sickness benefits is where the primary or predominant cause of the disability changes from injury to sickness, and vice versa.[1] A continuum from one coverage classification to another, absent some indication to the contrary, logically suggests that the transformation from one classification to the other occurs near the middle.[2] In other words, according to the textual guidance of the instant contract policy, in which the respective coverages for injury and sickness benefits are apparently symmetrical and equivalent, I do not believe that one form of coverage takes precedence over the other. Thus, the primary or predominant standard is reasonably inferred, in my judgment.

I believe that this construction of the policy here better comports with the reasonable expectations of both parties than does the majority's construction. I may well have reached a different conclusion regarding its meaning if the policy had excluded coverage for sickness altogether. In that case, the expectations of the insured would probably have been significantly higher with respect to the scope of injury coverage; construing the policy in favor of coverage would be more clearly required under such circumstances. However, in the instant case plaintiff receives some disability benefits whether he suffered disability predominantly caused by injury or by sickness. I believe that he was clearly apprised by the policy language that at least some future disabilities would entitle him only to benefits for a shorter amount of time, and that not all disabilities would entitle him to enhanced benefits. Similarly, plaintiff could not reasonably have expected the injury clause always to take precedence within the policy such that anytime there were "substantial" contributions of both sickness and injury toward a disability, this would necessarily result in the enhanced injury benefits. There is nothing in the language of the policy that suggests that the injury provision should subordinate or "trump" the sickness provision where both are potentially applicable. Neither plaintiff nor defendant could reasonably have interpreted the policy in such a manner, in my judgment.

Therefore, I conclude that the language and structure of the insurance policy here indicates that enhanced injury benefits should be paid only where the insured can show that his disability results primarily or predominantly from the injury he suffered. Here, a reasonable insured would not have assumed that the policy, as written, covers him at the enhanced level where sickness contributed more than injury to the total disability, even though both were a "substantial factor" in causing the disability.

The majority here applies a proximate cause, negligence standard to an insurance contract.[3] They would accord the insured enhanced coverage whenever an injury was a "substantial factor" in causing a disability, no matter in what proportions or degree a sickness also contributed to the disability. The majority cites the applicable contract principles, and properly reads the policy language as creating a continuum of coverage between two equally significant and symmetrical clauses. However, I respectfully believe that the majority does not follow this analysis to its logical conclusion, instead choosing, without further explanation, to apply a tort standard of causation that appears to be unconnected to the language of this policy.

This is a contract case, not a tort case; thus, I believe that there is no logical reason to apply a tort standard unless the parties themselves have explicitly stated their preference for such a standard, or unless this Court were constrained to follow precedent which applied such a standard. Neither of these circumstances is present in this case. The "substantial factor" standard may at first appear to be an appropriate standard here, since it is generally applied in negligence cases in which two or more factors have contributed to an accident, similar to the facts here. See Prosser & Keeton, Torts (5th ed), § 41, p 266-68. However, this standard has been devised so that liability may be imposed upon more than one tortfeasor where there are several whose negligence has been a "substantial factor" in causing an injury.[4] *Id.* The majority seems to hold that the injury provision subordinates the sickness provision by stating that the test to be followed in applying the standard is to only "look to the facts of plaintiff's disability to see whether his torn rotator cuff resulted from a discrete injury that was a substantial factor in bringing about the disability." Apparently, where there are two possible causes of a disability, the "substantial factor" test is only applied to determine whether enhanced injury benefits should be given, and sickness benefits are the default position in the alternative. In my judgment, such an interpretation is incorrect since it does not reconcile the two equally significant provisions of the policy, resulting in situations in which a disabled person is awarded enhanced injury benefits where, although an injury is a "substantial factor" in causing a disability, sickness is an even greater contributing factor. Thus, again I believe that a logical reading of the contract language, keeping in mind the reasonable expectations of the parties, leads to the proper balance between injury and sickness coverage established at that point at which one factor predominates over the other in causing the disability.

For these reasons, I concur in the reversal of the trial court's grant of summary disposition. I would also remand to the trial court, but for application of a different standard than that set forth by the majority: whether plaintiff has suffered a discrete injury that was predominantly or primarily responsible for his disability.

/s/ Stephen J. Markman

[1] I note that in *Kangas v New York Life Ins Co*, 223 Mich 238, 193 NW 867 (1923), the Supreme Court stated that insurance clauses that provide coverage only where an accident is the "sole" cause of death should not be interpreted literally:

> In most cases a policy of this character would be of little or no value to the insured if the limiting language be literally interpreted as claimed by the defendant.

> Death from an external injury, unless instantaneous, is usually the result of various concurring causes. The injury sets in motion other agencies and awakens dormant internal ailments which contribute to death. These are conditions rather than causes. If such insurance contracts are to be of any value to the man who pays for the risk assumed, a construction as fair and reasonable to the limiting language will permit should be placed upon them.
>
> "We think the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the *predominant factor* in the production of the result, and not that it must have been so virulent in character as necessarily and inevitably to have produced that result, regardless of all other conditions and circumstances. . ." [*Kangas, supra* at 243-44, quoting *Driskell v Ins Co,* 117 Mo App 362; 93 SW 880 (1906) (emphasis added).]

The *Kangas* Court use of the "predominant" standard, i.e. the "efficient, dominant, proximate cause," *id* at 244-45, illustrates that, even where the drafters of the contract have explicitly inserted "solely" into the contract, the Supreme Court has disfavored such language and instead employed a standard that grants the enhanced injury coverage at somewhat approximating the center of the sickness-injury continuum. *Id*. at 244. Here, neither party has explicitly inserted "solely" language into the contract, and the language of the contract strongly implies a continuum of coverage in which some consideration must be given to the respective contributions of sickness and pre-existing condition to the insured's disability. Thus, I reference *Kangas* to point out that the standard which, in my judgment, most logically represents the intentions of the parties as shown by the language of the contract, has been applied in similar cases, based on the Court's analysis of the contract language and the parties' reasonable expectations.

[2] Where, in a particular case, it cannot be determined whether the disability is primarily or predominantly attributable to the pre-existing condition or to the accident, such a circumstance would constitute a truly ambiguous situation in which matters must be resolved in favor of the insured. See *South Macomb Disposal Authority v American Ins Co,* 225 Mich App 635, 653; 572 NW2d 686 (1997) (ambiguities in insurance contract language are interpreted favorably to the insured where the insurer has drafted the policy).

[3] Presumably, the majority applies a negligence standard on the basis of the contract provisions "as a result of sickness," and "as a result of injury," which require that causation be determined with respect to these clauses. However, the use of the same language in each provision mandates that the standard be applied equally to both sickness and injury, not just injury.

[4] Applied to the policy at issue here, this would seem to suggest, if anything, a *double* recovery of both sickness benefits and injury benefits where sickness and injury are both "substantial factors" in causing the disability.